

# Minnesota Lawyer

## Quandaries and Quagmires: A year in the life of an ethics column

By: [Charles Lundberg](#) December 23, 2016

Last December the *Minnesota Lawyer* announced “the start of a new monthly [ethics column](#), ‘Professional Quandaries and Quagmires.’ ... You may be familiar with our new columnists — Bill Wernz and Chuck Lundberg. They will alternate monthly.”

It’s been quite a year, and many lessons learned,<sup>i</sup> about how to be an ethics columnist, how many hours it really takes to do this, and how to write most effectively about ethics for Minnesota lawyers.<sup>ii</sup>

Bill kicked it off in December with *Discipline for disproportionate contingent fee*,<sup>iii</sup> an incisive and critical analysis of a very recent<sup>iv</sup> case of first impression in Minnesota, addressing when a lawyer may be required — on pain of discipline — to substantially reduce an agreed contingent fee because the recovery was just too quick, too easy and/or too large. It was, as Bill noted, “a quantum leap in Minnesota disciplinary regulation of contingent fees.”

The column quickly prompted some equally provocative commentary by the *Minnesota Litigator* blog (“[T]he bottom line is that the Minnesota Board of Professional Responsibility should not get involved in deciding when it thinks that lawyers make too much money because, frankly, they do not have a clue.”).<sup>v</sup>

My first column<sup>vi</sup> in January analyzed the role of attorney remorse in recent Minnesota discipline case law and provided some practical advice for how to do remorse well.<sup>vii</sup>



### [Giving good remorse](#)

**Online Dec. 29, 2015. In print Jan 4, 2016.**

*“Remorse in attorney disciplinary proceedings has been much in the news in the Minnesota legal community in 2015 — five major Supreme Court decisions, and additional commentary...”*

Writing that first column brought to light several technical requirements for good column writing: the importance of a catchy title, and good artwork; the care and restraint needed when criticizing court decisions in print; and — most important — how to be topical, trendy and buzzworthy.<sup>viii</sup>

In subsequent columns throughout the year, Bill addressed several new decisions and ethics commentary raising thorny ethical issues (discipline for prosecutor’s ‘derogatory’ statements, what is — and is not — ethically required when you get a subpoena for an ex-client’s file, discipline for violence or coercion by an attorney).

The March column took a decidedly different turn, telling an astonishing and lurid tale about counsel in a notorious high-profile trial in Florida who had used their young female paralegal as an undercover operative, drinking and flirting with opposing counsel in a bar, and then enticing him to drive her car into a pre-arranged DUI stop and arrest — *during the trial*.<sup>ix</sup>



Melissa Personius, a paralegal at the firm of Adams & Diaco, is questioned as a witness at a hearing in Clearwater, Florida, in the case against three Adams & Diaco lawyers accused of orchestrating a DUI set-up. (AP photo: The Tampa Tribune)

### [Is this the most outrageous discipline story ever?](#)

**Online March 24, 2016. In print March 28, 2016**

*“Young female paralegal, operating undercover, flirts opposing counsel into a DUI...”*

Here’s the rest of the story: In an opinion issued several months later, the Florida Supreme Court *permanently* disbarred the attorneys, apparently agreeing with our “most outrageous” tag, calling the misconduct some of “the most shocking, unethical, and unprofessional” it had ever seen, struggling to find the words to express sufficient judicial horror for how low attorneys could stoop in their quest to win a case, behavior that was “stunning,” “unique and essentially unprecedented,” “a deliberate and malicious effort to place a heavy finger on the scales of justice for the sole benefit of themselves and their client.”<sup>x</sup>

In May, the column spotlighted two nationally trending ethics issues.<sup>xi</sup>



### [Breaking Ethics Issues – Benchslaps and Cyber Threats](#)

**Online May 12, 2016. In print May 16, 2016**

Over the last few weeks the legal press has been buzzing with a number of breaking topics about ethics and the law of lawyering. Here are two:

“Benchslaps – The Judge as Bully” criticized certain federal appellate judges who were way over the top in the benchslap department, and gently cautioned Minnesota judges on the importance of restraint in this area. “Cyber Threats – A new Ethics Issue and the Next Big Exposure for Law Firms” reported on the then just breaking Panama papers story, which vividly illustrated the very real ethical problem law firms face for failing to have secure computer systems protecting client confidences.

Finally, my last two columns focused on some very practical ethical issues that arise in the law firm setting, discussing how to instill a spirit of ethical practice within a firm, and presenting a snapshot of the hottest legal ethics and risk issues currently facing law firms nationally.<sup>xii</sup>

### [Inculcating legal ethics in the law firm](#)

**Online July 21, 2016. In print July 25, 2016.**

*“In-cul-cate: to instill (an attitude, idea or habit) by persistent instruction. Inculcate is a verb — an active verb — it’s something you do.”*

### [The hottest law firm exposure issues](#)

**Online Sept. 22, 2016. In print Sept. 26, 2016**

*And one old classic that will never go away...*

These “ethics in the law firm” columns are by far the most gratifying to write, since they are intended to provide real and tangible value to my colleagues at the bar. I was therefore pleased for the opportunity to re-work these two columns into a longer article for this month’s *Bench & Bar of Minnesota*.<sup>xiii</sup>

*Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. He served for twelve years on the Minnesota Lawyers Board, including six years as board chair. He retired in 2015 after 35 years as a partner at Bassford Remele, and now advises attorneys and law firms through Lundberg Legal Ethics.*

## Footnotes

<sup>i</sup> The first lesson – the dreaded footnote problem. Newspaper columns aren't normally footnoted, and editors usually hate them. But often a cite or a collateral point needs to be made, and must go somewhere else, lest it break the flow of the article.

This is an especially thorny issue for this paper, which is published in both an online version — where a clickable URL to an important resource or authority is a wonderful aid to readers — and in a paper version, where spelling out the URL in the text is a horrible distraction.

We've tried several different approaches, including using footnotes in the online version but deleting them from the paper version. None of them is a perfect solution; we're continuing to work on it.

<sup>ii</sup> Who even reads this column? At the outset, I assumed I was writing to pretty much the entire bar. For years, I would read this paper as soon as it came out each Monday. Didn't everyone? It was humbling to realize that most attorneys I encountered had no idea that this column even existed. I'll tell you who does seem to read it, though – judges. Lots of judges.

<sup>iii</sup> <http://minnlawyer.com/2015/12/03/quandaries-and-quagmires-discipline-for-disproportionate-contingent-fee-2/>

Most of Bill's columns are cross-posted and accessible at the MSBA my.mnbar.org site:

<http://my.mnbar.org/search?executeSearch=true&SearchTerm=wernz&st=MostRecent>

This brings up the whole issue of how to find, cite and use *Minnesota Lawyer* ethics columns, because — as you may have noticed — we are writing from behind a pay wall.

The *Minnesota Lawyer* website has a great search function for locating articles. Go to the home page — minnlawyer.com — and enter the author's name or a topic in the red "Search . . ." box at the top of the page.

If you don't subscribe/have access to the online version, however, it is difficult to find or cite the full text of an article. The standard among legal ethics professionals is to provide a link to one's commentary. But that won't work with a pay wall; to cite or share or post one of these columns, the only option is to paste the text into a Word document.

<sup>iv</sup> Recency/immediacy has been and always will be a hallmark of this column. If something ethically important happens, you'll likely hear about it here first. See, for example, Bill's most recent column thoroughly examining new Lawyers Board Opinion 24 (ethical restrictions on whether a lawyer may respond to comments on the internet which are critical of the lawyer's work, professionalism, or other conduct). Bill's column was posted *less than two weeks* after the Board adopted the Opinion.

<http://minnlawyer.com/2016/10/13/quandaries-and-quagmires-lawyers-board-opinion-24-some-questions/>

Cross-posted at <http://my.mnbar.org/blogs/william-wernz/2016/11/07/quandaries-and-quagmires-lawyers-board-opinion-24-some-questions>

Opinion 24 itself is available

here: <http://lprb.mncourts.gov/Pages/Opinion%2024.pdf>

Finally, the OLPR just published its own analysis of the issues surrounding the new opinion:

<http://mnbenchbar.com/2016/12/client-confidentiality-and-client-criticisms/>

<sup>v</sup> Having your ethics column cited or commented on by other publications (or tweeted, or posted on a national legal ethics list serv or Facebook page, etc.) is pretty much the holy grail, especially when the commentary starts like this: "Minnesota Ethics God, Bill Wernz, recently published insightful analysis on the case."

<http://www.leventhalpllc.com/2016/01/ethics-morality-and-lawyers-contingent-fees/>

<sup>vi</sup> When should a columnist use a first-person pronoun? Practices vary widely. Bill Wernz almost never uses <I, me, my>. Veteran columnist Sybil Dunlop does it

constantly and to great effect; it is an integral part of her voice as a writer. Others like Eric Magnuson do it, but only sparingly.

vii <http://minnlawyer.com/2015/12/29/charles-lundberg-giving-good-remorse/>

viii The column's first awkward attempt at trendiness: a ripped-from-the-headlines sidebar about how "remorse" was also trending in the popular press in late 2015, showing up everywhere from coverage of the hack of the Ashley Madison site to Adrian Peterson's child abuse case, the Volkswagen emissions scandal and other breaking corporate misdeeds, "and repeated, extraordinary — almost heroic — examples of utter lack of remorse by Donald Trump, a leading contender in the 2016 Republican presidential primary race."

ix <http://minnlawyer.com/2016/03/24/is-this-the-most-outrageous-discipline-story-ever/>

x <http://www.courthousenews.com/2016/08/26/acts-of-disbarred-lawyers-called-most-shocking-unethical-ever.htm>

<http://www.tampabay.com/news/courts/last-two-lawyers-disbarred-in-diacodui-set-up/2290994>

xi <http://minnlawyer.com/2016/05/12/breaking-ethics-issues-benchslaps-and-cyber-threats/>

xii <http://minnlawyer.com/2016/07/21/quandaries-and-quagmires-inculcating-legal-ethics-in-the-law-firm/>

<http://minnlawyer.com/2016/09/22/quandaries-and-quagmires-the-hottest-law-firm-exposure-issues/>

xiii <http://mnbenchbar.com/2016/12/ethics-partner/>